

September 7, 2005

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: James Salsman

Date of Filing: August 17, 2005

Case Number: TFA-0114

On August 17, 2005, James Salsman (Salsman) filed an appeal from a determination issued to him on August 5, 2005, by the Department of Energy's (DOE) Chicago Operations Office (CO). In that determination, CO denied a request for a waiver of fees in connection with a request Salsman submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This appeal, if granted, would overturn CO's determination and waive in full the fees associated with his request.

I. Background

Salsman filed a request under the FOIA for "all records of funds appropriated, budgeted, allocated, committed, programmed, expended, encumbered, utilized, or spent for the purposes of determining the full toxicological profile of uranium, uranium compounds, or uranium combustion products." Letter from Linda M. Rohde, Freedom of Information Officer, to James Salsman (July 7, 2005). Salsman planned to include this information in a Petition for Rulemaking he submitted to the Nuclear Regulatory Commission (NRC).

In his FOIA request, Salsman also requested a fee waiver for the costs associated with processing the request. In its August 5, 2005 determination letter, CO denied a fee waiver. Letter from Linda M. Rohde, Freedom of Information Officer, CO, to James Salsman (August 5, 2005) (Determination Letter). CO denied the request for a waiver because Salsman did not "demonstrate how [he] will disseminate the information to the general public." *Id.*

Salsman filed the present appeal on August 17, 2005. Letter from James Salsman to OHA (August 8, 2005) (Appeal Letter). In his appeal, Salsman states the requested information will be

disseminated to the public because it is the practice of the NRC to publish all comments it receives on its website.¹ Therefore, he says, “publication will occur.” Appeal Letter.

II. Analysis

The FOIA generally requires that requesters pay fees associated with processing their requests. 5 U.S.C. § 552(a)(4)(A)(i); *see also* 10 C.F.R. § 1004.9(a). However, the FOIA provides for a reduction or waiver of fees only if a requester satisfies his burden of showing that disclosure of the information (1) is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and, (2) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 10 C.F.R. §1004.9(a)(8).

In analyzing the public-interest prong of the two-prong test, the regulations set forth the following factors the agency must consider in determining whether the disclosure of the information is likely to contribute significantly to public understanding of government operations or activities:

- (A) The subject of the request: Whether the subject of the requested records concerns “the operations or activities of the government” (Factor A);
- (B) The informative value of the information to be disclosed: Whether disclosure is “likely to contribute” to an understanding of government operations or activities (Factor B);
- (C) The contribution to an understanding by the general public of the subject likely to result from disclosure (Factor C); and
- (D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities (Factor D).

10 C.F.R. § 1004.9(a)(8)(i).

Factor A

Factor A requires that the requested documents concern the “operations or activities of the government.” *See Department of Justice v. Reporters Comm. for Freedom of the Press*, 109 S. Ct. 1468, 1481-1483 (1989); *U.A. Plumbers and Pipefitters Local 36*, 24 DOE ¶ 80,148 at 80,621 (1994). In the present case, there appears to be no dispute that the requested information – records of funds appropriated, budgeted, allocated, committed, programmed, expended, encumbered, utilized, or spent for the purposes of determining the full toxicological profile of uranium, uranium compounds, or uranium combustion products – concerns activities or operations of the government. Therefore, we find that Salsman’s request satisfies Factor A.

¹ The website referred to in the Appeal Letter is ruleforum.llnl.gov. It is a webpage on the NRC’s website that allows users to submit comments electronically, rather than by regular mail.

Factor B

Under Factor B, disclosure of the requested information must be likely to contribute to the public's understanding of specifically identifiable government operations or activities, i.e., the records must be meaningfully informative in relation to the subject matter of the request. *See Carney v. Department of Justice*, 19 F.3d 807, 814 (2d Cir. 1994). This factor focuses on whether the information is already in the public domain or otherwise common knowledge among the general public. *See Roderick Ott*, 26 DOE ¶ 80,187 (1997); *Seehuus Associates*, 23 DOE ¶ 80,180 (1994) ("If the information is already publicly available, release to the requester would not contribute to public understanding and a fee waiver may not be appropriate.").

In the present case, it is unclear whether the requested information is already publicly available. However, given the nature of the information requested – records regarding funds allocated for determining the toxicological profile of uranium and other uranium products – and because we have no evidence that the information is already publicly available, we will assume that the information is not already in the public domain. Therefore, we find that Salsman has satisfied Factor B.

Factor C

Factor C requires that the requested documents contribute to the general public's understanding of the subject matter. Disclosure must contribute to the understanding of the public at large, as opposed to the understanding individually of the requester or of a narrow segment of interested persons. *Schrecker v. Department of Justice*, 970 F. Supp. 49, 50 (D.D.C. 1997). Thus, the requester must have the intention and ability to disseminate the requested information to the public. *Ott*, 26 DOE at 80,780; *see also Tod N. Rockefeller*, 27 DOE ¶ 80,184 (1999); *James L. Schwab*, 22 DOE ¶ 80,133 (1992). In the present case, it is not disputed that Salsman intends to disseminate the requested information to the public. However, CO determined that Salsman did not establish his ability to disseminate the information.

We find that Salsman has not provided adequate evidence of his ability to disseminate the requested information to the public. Salsman contends that publication of the requested information will occur because he plans to include the requested information in a comment he will submit to the NRC and it is the practice of the NRC to place all comments it receives on its website. This falls short of the proof required to establish a requester's ability to disseminate responsive information to the public. We have previously held that a plan to place information on the internet is a passive method of placing the information in the public domain, compared to, for example, including the information in a newsletter or in printed articles and, therefore, falls short of the showing necessary to satisfy Factor C. *See Donald R. Patterson*, 28 DOE ¶ 80,107 (2000); *see also STAND*, 27 DOE ¶ 80,250 (1999). In this case, Salsman's plan is an even more passive method of disseminating the requested information to the public because he is relying on a third-party, the NRC, to post the information on its website. Salsman has no control over whether the information actually gets posted and, therefore, disseminated to the public. In fact, under the federal Administrative Procedure Act, the NRC is not obligated to publish every

comment it receives; rather it is required only to address every issue raised by those comments. *See* 5 U.S.C. §553(c). Consequently, we find that Salsman has not satisfied Factor C.

Factor D

Under Factor D, the requested documents must contribute significantly to the public understanding of the operations and activities of the government. “To warrant a fee waiver or reduction of fees, the public’s understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent.” *Ott*, 26 DOE at 80,780 (quoting *1995 Justice Department Guide to the Freedom of Information Act* 381 (1995)).

In the present case, it remains unclear to what extent the public’s understanding is likely to be enhanced by the disclosure of the information. However, we need not reach the issue because the inability to disseminate the information to the public is, in itself, a sufficient basis for denying a fee waiver request. *See Donald R. Patterson*, 27 DOE ¶ 80,267 at 80,927 (2000) (citing *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988)).

III. Conclusion

As the foregoing indicates, Salsman has failed to adequately demonstrate his ability to disseminate the requested information to the public. Therefore, we find that Salsman has not shown that disclosure of the requested information is likely to contribute significantly to public understanding of government operations or activities. Because Salsman has not satisfied the public-interest prong of the test set forth in the FOIA and in the DOE regulations concerning fee waivers, we need not address the commercial-interest prong of that test. Accordingly, the appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on August 17, 2005 by James Salsman, OHA Case No. TFA-0114, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 7, 2005